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No. 80-2155

In the Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's instruction to the jury on character evidence was erroneous because it did not explicitly recite that such evidence, standing alone, could raise a reasonable doubt as to petitioner's guilt.

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OPINIONS BELOW

Petitioner was tried before a jury and the district court issued no written opinion. The court of appeals affirmed petitioner's conviction by rendering an unreported oral opinion in open court (Pet. App. 22a-23a).

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1981 (Pet. App. 41a). A petition for rehearing was denied on April 21, 1981 (Pet. App. 42a). The petition for a writ of certiorari was filed on June 19, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

On April 18, 1978, a criminal information was filed against petitioner charging him with two counts of willfully failing to file federal income tax returns for the years 1974

and 1975, in violation of 26 U.S.C. 7203 (A. 22-23).[1] Following a jury trial, petitioner was convicted as charged. His conviction was reversed on appeal on grounds unrelated to the present petition, and the case was remanded for a new trial (Pet. App. 24a-40a).[2] After a second jury trial, petitioner was again convicted on both counts of the information (A. 1411). Petitioner was fined $10,000 and was sentenced to concurrent one-year terms on each count, with execution of the sentence of imprisonment suspended after service of six months (A. 1497).

At trial, the United States presented undisputed evidence that petitioner earned sufficient income to require the filing of federal income tax returns in 1974 and 1975 (A. 473-475, 480-481). The prosecution also introduced undisputed evidence that petitioner failed to file such returns.[3] Finally, the United States introduced evidence of the willfulness of petitioner's failures to file (A. 141, 154, 158, 197, 390-392). Petitioner defended by raising objections to the imposition of the federal income tax on wages and by contending that no one in the country is required to file an income tax return (A. 101, 111, 145). He also contended that if his "research" indicating that his protest filings adequately fulfilled his duty to file returns was incorrect, his mistake was in good faith and therefore not willful (A. 146). Petitioner finally introduced the testimony of character witnesses, consisting of his rabbi (A. 1123), a pharmacist and former fraternity brother (A. 1130), and a high school friend who became a local judge (A. 1134).

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[1]"A." refers to the appendix filed in the court of appeals.

[2]The reversal was based on the erroneous introduction at trial of a videotape of petitioner made during a television appearance.

[3]Petitioner filed so-called "protest" forms, which contained statements protesting the imposition of the federal income tax, but not information from which income or taxes could be determined (A. 160-169, 187-190).

Petitioner requested that the following charge be given to the jury concerning character evidence (A. 92):

> Mr. Schiff has presented character evidence of good reputation for truth and veracity, honesty and integrity, and as being a law abiding citizen. The jury should consider such evidence along with all the other evidence in the case. Such evidence of a defendant's good character, which is inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may itself give rise to a reasonable doubt in your mind, since the jury may believe it unlikely that a man with such a good character would commit the offense charged.

The trial judge instructed the jury as follows with regard to character evidence (A. 1308-1309):

> Normally in criminal cases the character and the reputation of the accused is not an issue in the first instance. The Government has no right to initially introduce any evidence in a criminal case that an accused has a bad reputation, however, the accused may, if he so desires, bring his own character and reputation into the case. He has the right, a right which in this case the accused exercised, to present witnesses to testify as to his general reputation for truthfulness and honesty in the community. Such evidence of his good character and reputation for truthfulness and honesty in the community wherein he resides and in his profession should be considered by you with the other evidence in the case.
>
> If a man by a life of good conduct has gained the esteem of those with whom he's been associated, and has thus attained a fair and honerable [*sic*] reputation for truth and honesty in the community in which he lives, or where he works, it is proper that it should

> count in his favor in his hour of need. But if you believe from all of the evidence that the accused is guilty beyond a reasonable doubt, you should not hesitate to convict him, notwithstanding that he may have heretofore borne a good name and reputation; neither should you fail to give due consideration to his good reputation, if such he had, when you weigh the evidence against him. However, you know without reminder from me that men of good reputation may do wrong and commit crimes, although such men are less likely to do so than those who have no reputation to lose.

Petitioner objected to the court's charge on character evidence (A. 1343).

On appeal, petitioner asserted 19 claims of error, including the court's character evidence instruction. The court of appeals found all the asserted grounds to be without merit and affirmed the conviction in open court (Pet. App. 22a-23a).

ARGUMENT

Petitioner's sole contention here is that the district court erred in refusing to instruct the jury that character evidence may by itself raise a reasonable doubt in the minds of the jury, and he asks this Court to resolve an asserted conflict between and within the circuits on this point.[4] This Court, however, has consistently denied certiorari on the many previous petitions that have been presented to it on this precise question.[5] For the reasons which follow, certiorari should be denied in this case as well.

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[4]Any inconsistency which may exist within a circuit should be resolved by the court of appeals rather than this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[5]See, *e.g.*, *Oertle* v. *United States*, 370 F. 2d 719 (10th Cir. 1966) (en banc), cert. denied, 387 U.S. 943 (1967); *Smith* v. *United States*, 305 F. 2d 197 (9th Cir.), cert. denied, 371 U.S. 890 (1962); *Black* v. *United*

The overwhelming majority of federal appellate decisions hold that the jury need be told only, in effect, that evidence of good character must be considered with all the other evidence in the case and that guilt or innocence depends upon whether there is a reasonable doubt based upon all such evidence. See, *e.g.*, *United States* v. *Lachmann*, 469 F. 2d 1043, 1046 (1st Cir. 1972); *United States* v. *Fayette*, 388 F. 2d 728, 736-737 (2d Cir. 1968); *United States* v. *Quick*, 128 F. 2d 832, 835-837 (3d Cir. 1942); *Mannix* v. *United States*, 140 F. 2d 250, 253-254 (4th Cir. 1944); *United States* v. *Ramzy*, 446 F. 2d 1184, 1186-1187 (5th Cir. 1971); *United States* v. *Fontenot*, 483 F. 2d 315, 323 (5th Cir. 1973); *Poliafico* v. *United States*, 237 F. 2d 97, 114 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957); *United States* v. *Brown*, 353 F. 2d 938, 940 (6th Cir. 1965); *Haffa* v. *United States*, 36 F. 2d 1, 5 (7th Cir.), cert. denied, 281 U.S. 727 (1929); *Black* v. *United States*, 309 F. 2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *Sunderland* v. *United States*, 19 F. 2d 202, 215 (8th Cir. 1927); *Smith* v. *United States*, 305 F. 2d 197, 205-207 (9th Cir.), cert. denied, 371 U.S. 890 (1962); *Oertle* v. *United States*, 370 F. 2d 719, 726; (10th Cir. 1966) (en banc), cert. denied, 387 U.S. 943 (1967); *Swingle* v. *United States*, 389 F. 2d 220, 222 (10th Cir.), cert. denied, 392 U.S. 928 (1968); *Marzani* v. *United States*, 168 F. 2d 133, 138-139 (D.C. Cir.), aff'd by an equally divided Court, 335 U.S. 895 (1948), aff'd by an equally divided Court on rehearing, 336 U.S. 922 (1949).[6]

States, 309 F. 2d 331 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963); *United States* v. *Cashio*, 420 F. 2d 1132 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970); *Poliafico* v. *United States*, 237 F. 2d 97 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).

[6]Indeed, advising the jury that evidence of good character alone may create a reasonable doubt could give undue prominence to character evidence and mislead a jury into believing it must ignore other evidence and vote for acquittal if such character evidence is believed. See *United States* v. *Quick*, *supra*, 128 F. 2d at 836; *Mannix* v. *United States*,

These decisions are clearly consistent with this Court's previous decisions in *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948), both cited by petitioner. Nothing in those decisions mandates the jury instruction petitioner contends is required. In *Edgington*, this Court struck down a jury instruction because it directed the jury to consider character evidence only if the other evidence caused the jury to hesitate as to guilt. The Court held (164 U.S. at 366):

> the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Edgington stands for the proposition that character evidence must be *considered* by the jury, irrespective of whether the rest of the evidence raises a reasonable doubt as to guilt. The case did not, however, establish an absolute requirement that a jury be affirmatively instructed that character evidence alone may create a reasonable doubt. Rather, the Court's statement that character evidence might alone raise such a doubt merely explains why a jury must be instructed to consider character evidence in all cases. Similarly, *Michelson* v. *United States, supra*, a case dealing with the scope of cross-examination on character evidence, likewise does not compel an instruction that such evidence alone may raise a reasonable doubt. At most, it requires

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supra, 140 F. 2d at 253-254; *Smith* v. *United States, supra*, 305 F. 2d at 206; *Baugh* v. *United States*, 27 F. 2d 257, 261 (9th Cir.), cert. denied, 278 U.S. 639 (1928).

that such an instruction be given "in a proper case." *Michelson* v. *United States, supra,* 335 U.S. at 476.[7]

The instruction given in this case (A. 1308-1309) was clearly in line with the character evidence instruction found satisfactory by virtually every federal appellate court. It adequately conveyed to the jury that character evidence was offered to indicate petitioner was less likely to commit the offense charged, that the jury was required to consider such evidence with all the other evidence in the case, and that the jury's verdict was dependent on whether it believed there was a reasonable doubt concerning petitioner's guilt.[8]

Some decisions have held that the jury should be told that evidence of good character may alone be sufficient to raise a reasonable doubt. But this authority is far less extensive than petitioner suggests. For example, while cases in the Tenth Circuit formerly required an instruction that evidence of good reputation may itself raise a reasonable doubt (see, *e.g., Petersen* v. *United States,* 268 F. 2d 87 (1959) (en banc)), that court has subsequently made clear that it follows the position, maintained by the majority of other courts, that the instruction at issue is not rigidly

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[7]Thus, for example, if a trial incident or a remark by the prosecutor could lead the jury to believe such evidence could not, on its own, create a reasonable doubt, a corrective instruction would be appropriate and perhaps required. *Smith* v. *United States, supra,* 305 F. 2d at 206.

[8]Petitioner's contention (Pet. 17-21) that the instruction given in this case did not instruct the jury that character evidence, when considered with all the other evidence, may raise a reasonable doubt is simply not borne out by the facts. While the language of the instruction might not be cast in as favorable a light toward petitioner as he would like, a fair reading of the charge as a whole clearly indicates that the jury was instructed that it was required to consider the character evidence along with all the other evidence, and that such consideration was directed toward determining whether there was a reasonable doubt concerning guilt.

required. *Oertle* v. *United States, supra,* 370 F. 2d at 726-727 (en banc). *Swingle* v. *United States, supra,* 389 F. 2d at 222, a case which follows *Oertle,* removes any lingering doubt concerning whether there is a consistent position in the Tenth Circuit.[9]

It is also hardly clear that the two decisions from the Second Circuit cited by petitioner (Pet. 8) do, in fact, hold that the "alone" language is routinely required. In both *United States* v. *Minieri,* 303 F. 2d 550, 555 (2d Cir.), cert. denied, 371 U.S. 847 (1962), and *United States* v. *Cramer,* 447 F. 2d 210, 219 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972), the district court's jury charges were upheld although neither contained the "alone" language petitioner here seeks. Indeed, in both cases the instruction given was

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[9]Similarly, it is hardly clear, as petitioner suggests (Pet. 8-9), that any decision within the D.C. Circuit requires the giving of an instruction that evidence of good character alone may be sufficient to raise a reasonable doubt. While several cases from that circuit have said in dictum that such an instruction is required, we have not found a single case within that circuit where a conviction was reversed for failure to include the "alone" language. See, *e.g., United States* v. *Lewis,* 482 F. 2d 632, 637 (D.C. Cir. 1973) (jury instruction not at issue); *United States* v. *Fox,* 473 F. 2d 131, 134-135 (D.C. Cir. 1972) (jury instruction not at issue); *United States* v. *Wooden,* 420 F. 2d 251, 253 (D.C. Cir. 1969) (jury instruction not at issue); *Colbert* v. *United States,* 146 F. 2d 10, 11 (D.C. Cir. 1944) (conviction reversed because of a failure to instruct at all on character evidence, not because the court failed to include in its charge the "alone" language).

Moreover, petitioner is incorrect in asserting (Pet. 9-10, 15) that there is a clear internal conflict within the Ninth Circuit. *Weedin* v. *United States,* 380 F. 2d 657 (9th Cir. 1967), does not disclose either the requested charge or the one actually given to the jury, and there is thus no basis for determining whether the instruction in that case conflicts with any other opinion from the circuit. Likewise, petitioner's suggestion (Pet. 8) of a possible conflict in the Fifth Circuit is unfounded. The court in *Darland* v. *United States,* 626 F. 2d 1235, 1237-1238 (5th Cir. 1980), consistent with the "in a proper case" language in *Michelson,* stated in dicta only that a defendant *may* be entitled to an "alone" charge.

upheld because it sufficiently explained the effect of character evidence and because, as the court of appeals noted here (Pet. App. 23a), the government's case was impressive. *United States* v. *Minieri, supra,* 303 F. 2d at 555; *United States* v. *Cramer, supra,* 447 F. 2d at 219. In *United States* v. *Crosby,* 294 F. 2d 928, 947-948 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962), and *United States* v. *Kabot,* 295 F. 2d 848, 855 (2d Cir. 1961), cert. denied, 369 U.S. 803 (1962), the court did not impose a requirement for an "alone" charge, but simply found no error in instructions given at trial that included such language.

Finally, although it appears, as petitioner contends (Pet. 8), that some decisions within the Seventh Circuit require the giving of the "alone" language, it is not clear that the Seventh Circuit invariably would require such an instruction. In *United States* v. *Wicoff,* 187 F. 2d 886, 890 (7th Cir. 1951), the court did say that evidence of good character may in itself be sufficient to create in the minds of the jury a reasonable doubt of defendant's guilt, but the court's reversal was based upon the fact that the district court told the jury it should consider the character evidence only if other evidence in the case left it in doubt. In *United States* v. *Donnelly,* 179 F. 2d 227, 233 (7th Cir. 1950), the court held that it was error for the trial court to refuse a request to instruct the jury that character evidence may in itself be sufficient to create a reasonable doubt, but it specifically noted that the outcome of that case depended largely upon the jury's relative appraisal of the credibility of the defendant, who testified on his own behalf, and the credibility of an accomplice, who testified for the government.

Upon examination, the conflict posed by petitioner is truly minor. The apparent divergence among the circuits does not warrant review by this Court. The rule of the great majority of courts—that, where the instruction otherwise clearly states the relationship between reputation evidence

and reasonable doubt, the court need not add that such evidence alone might create a reasonable doubt—does not affect such fundamental rights of the accused as to call for the exercise by this Court of its supervisory authority over the federal courts. A charge, such as the one given in this case, that character evidence must be *considered* with all the other evidence in the case implies that character evidence may alone raise a reasonable doubt, and therefore adequately guards against any miscarriage of justice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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